No. 4210

In The United States
Circuit Court of Appeals
For the Ninth Circuit

RICHARD E. KING,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF RICHARD E. KING,
Plaintiff in Error.

EDWARD H. CHAVELLE,
Attorney for Plaintiff-in-Error, Richard E. King.

315-321 Lyon Building,
Seattle, Washington.

Gateway Printing Co.

In The United States
Circuit Court of Appeals
For the Ninth Circuit

RICHARD E. KING,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF RICHARD E. KING, Plaintiff in Error.

STATEMENT OF THE CASE.

An information was filed in this case charging the plaintiff in error, Richard E. King, with a violation of the Narcotic Drugs Import and Export Act, on two counts; with the importation of opium, on Count I, and with the buying, receiving and concealing of the same opium, on Count II.

Thereafter and prior to the arraignment a petition to suppress the evidence, upon the ground of an illegal and unlawful search and seizure, was filed, which was denied and exception allowed (Tr. p. 10). Thereafter and prior to the arraignment an amended petition to suppress the evidence was filed, duly verified by the plaintiff in error and supported by his affidavit, which was denied and exception allowed (Tr. pp. 10-17). Thereupon, plaintiff in error was arraigned and thereafter entered a plea of not guilty and was placed on trial (Tr. 17-18).

At the conclusion of the trial the jury returned a verdict of guilty on both counts of the indictment against the plaintiff in error, and, after motions in arrest of judgment and for a new trial were duly made and denied, plaintiff in error was sentenced to serve a term of six years in the Federal Penitentiary on each count of the indictment, terms to run concurrently, and to pay a fine of fifty dollars on each of Counts I and II (Tr. pp. 25-26).

The evidence of the Government tended to establish that on the 16th day of April, 1923, A. B. Hamer, a Government agent, in conjunction with John F. Majewski, a police officer, and C. Howaldt, also a police officer, stopped Richard E. King, the plaintiff in error, who was driving a "for hire" automobile in a peaceful and orderly manner on a public highway; that the officers were not armed with a search warrant or any warrant at all, but

immediately placed the plaintiff in error under arrest and proceeded to search his automobile and found some bundles lying on the floor of the car, which were securely wrapped, and also some sacks or bundles of the same character under the hood of the car; that the sacks were opened by the Federal Officer, A. B. Hamer, who was present at all times during the search and seizure, participating in the arrest and in the search and seizure, and that the sacks were found to contain smoking opium and were taken to the Post Office Building by the said Hamer, remaining in his possession during all the time until the trial; that they knew it was not the property of the plaintiff in error (Tr. pp. 44-53).

Officer Majewski testified:

That he had not met the plaintiff in error before the 16th day of April, 1923 (the day in question), and when the plaintiff in error's car was stopped he did not know what was in the car. Plaintiff in error was proceeding in a peaceful, orderly manner along the highway; that he, the officer, was out looking for prowlers (Tr. p. 46).

That at the time of the plaintiff in error's arrest there was with the witness Mr. Hamer, a federal officer (Tr. p. 45).

A. B. Hamer, Federal Agent, called as a witness on behalf of the Government, testified as follows:

"Q. You participated in this arrest?

"A. Yes, sir, I did.

"Q. You participated in the search?

"A. Yes, sir.

"Q. Mr. Hamer, an affidavit was filed in this case that the defendant was halted by you. Did you not swear to that?

"A. He was halted by us—Majewski.

"Q. Your affidavit under date of the 14th of June, to refresh your recollection, says: 'The defendant was halted by affiant'—that is yourself—'and said Majewski, and immediately placed under arrest,' that is right?

"A. And said Majewski.

"Q. And said Majewski?

"A. And said Majewski, yes."

(Tr. pp. 48-53).

The plaintiff in error admitted no identification whatsoever with the transaction, except that he operated a "for-hire" automobile, was employed by his stepfather as a driver, and while acting in such capacity received a telephone call to come to the Seattle Hotel, where he went, picked up two passengers, drove them to West Seattle; that while he was proceeding to Pioneer Square, where he started from, in a peaceful and orderly manner, he was stopped by the officers, and, while the car was curtained, it behind bad weather, it was opened and searched; the packages in the car were securely wrapped and he did not know that they contained

opium; that the arresting officers told him that they were just prowling around there and had stopped several cars that night (Tr. pp. 54-58).

The questions presented in the record are:

1. Did the Court err in denying the amended petition to suppress the evidence and in denying the motion of counsel for the plaintiff in error to dismiss Counts I and II of the indictment, made at the end of the Government's case, for the reason and upon the ground that all material evidence was secured by an unlawful search and illegal seizure of the plaintiff in error's automobile without a search warrant, and in denying the motion of plaintiff in error for a directed verdict, for the same reason and upon the same ground, and in overruling plaintiff in error's objections to the introduction of the evidence secured by the illegal and unlawful search and seizure.

2. Did the Court err in refusing to instruct the jury as requested in writing by the plaintiff in error.

3. Did the Court err in overruling counsel for the plaintiff in error's motion for an arrest of judgment and for a new trial.

ASSIGNMENTS OF ERROR.

Assignment No. 1. The Court erred in overruling the motion of the plaintiff in error to suppress the evidence, which motion was made before the case was called for trial and renewed before the jury was sworn and examined on their *voir dire,* and

again before the jury was sworn to try the case, for the reason that all the evidence was secured by an unlawful search and seizure.

The amended petition to suppress states that on the day in question A. B. Hamer, Special Federal Agent, stopped the automobile of the petitioner while he was proceeding in a lawful and peaceful manner, without a search-warrant or any warrant whatsoever, and proceeded to illegally and unlawfully search his car, without any warrant in law. Based upon the evidence so secured, this prosecution was commenced (Tr. pp. 10-14). Said petition was supported by the affidavit of Richard E. King, which, in substance, states that he was proceeding in a lawful and peaceful manner along the highway in his automobile when a special agent of the United States Treasury Department, located at Seattle, namely, A. B. Hamer, stopped the automobile of the plaintiff in error without any warrant and without the consent of the plaintiff in error and illegally and unlawfully and without any search warrant or any warrant in law, proceeded to search his automobile, while the plaintiff in error protested against such search; said officer found a package in the tonneau of said car, the contents of which were unknown to plaintiff in error, which was securely wrapped in burlap, and that said officer, A. B. Hamer, Federal agent, broke open said package and examined the contents; that there was another officer, John W. Majewski, with the said A. B.

Hamer at said time and place; that thereafter they raised the hood of the automobile and found certain packages under the hood of the same, and that subsequently a charge was filed based upon said evidence solely, unlawfully and illegally secured (Tr. pp. 14-15).

The affidavit of A. B. Hamer states that he was a Special Agent of the United States Treasury Department; that he halted the plaitniff in error and immediately placed him under arrest and searched the automobile driven by the said plaintiff; in error that he had no search warrant and found certain sacks on the floor and under the hood of said car, upon which this prosecution is based (Tr. pp. 18-19).

Said motion to suppress was denied and exception allowed (Tr. p. 17).

Assignment No. 2. The Court erred in allowing testimony to go to the jury during the trial of said case over the objection of counsel for plaintiff in error, which evidence was incompetent and to the prejudice of the plaintiff in error and an attempt to support the unlawful search and seizure.

> "MR. CHAVELLE: In order to preserve the record, I object to the introduction of any evidence. May the record so show before the jury is sworn.
>
> "THE COURT (To Jury): Stand up and be sworn.
>
> "Jury sworn and examined on their *voir dire,* at the conclusion of which, and after the

respective counsel had used what challenges they desired, the following occurred:

"THE COURT: The jury will now—

"MR. CHAVELLE—In order to keep the record clear—

"THE COURT—Be sworn to try the case.

"MR. CHAVELLE: Before they are sworn, I would like to make this motion—

"(Jury sworn to try the cause).

"THE COURT: What is the motion?

"MR. CHAVELLE: It was necessary that the motion, as I understand it, be made before the jury is sworn.

"THE COURT: No.

"MR. CHAVELLE: That is as I read the law. The motion may then be considered as made before the jury is sworn. I move to exclude all the evidence on the ground that there is no legal evidence in the case; it all having been secured by an illegal search and seizure.

"THE COURT: Denied. Proceed.

"MR. CHAVELLE: Exception, your Honor.

"THE COURT: Note it." (Tr. pp. 42-43).

John F. Majewski, called as a witness on behalf of the Government, testified that he was a police officer riding around the city; that he stopped the plaintiff in error, Richard E. King, who was coming from West Seattle. When they opened the rear door of the car they found some bundles lying on the floor.

"MR. CHAVELLE: Our objection goes to all of this for the reason and upon the ground that we contend that the evidence was secured illegally.

"THE COURT: Let him answer. Proceed.

"MR. CHAVELLE: Exception.

"Answer (Continuing): Some of them were a little longer than others. I would judge on the average they were about this size. They were about that square and possibly that long.

"Q. Now, for the purpose of the record, how long would you say those sacks were—how many inches?

"MR. CHAVELLE: For the purpose of the record also, I object to all of this so that there can be no question about it, on the ground it is not proper or relevant, the evidence having been secured illegally, by an unlawful search.

"THE COURT: Overruled.

"MR. CHAVELLE: Exception.

"Mr. Hamer, a federal officer, opened all the sacks to see whether they were all alike, and we talked to the defendant about the contents of the sacks. We searched the car thoroughly for papers or anything that might be of information to us, and we found two sacks under the hood. We just went and took charge of the car, and searched it minutely. That at the time of the defendant's arrest, there was with the witness Mr. Hamer, a federal officer, and Mr. Howaldt. That the opium was brought to the Post-office Building by Mr. Hamer, and left in Mr. Hamer's possession."

Testimony of C. Howaldt:

"Q. Did you have any conversation with the defendant King at that time?

"MR. CHAVELLE: I object to that, your Honor, for the purpose of preserving the record, for the reason and upon the ground that any conversation that was had at that time would be evidence that was secured through an illegal search anl seizure, and would not be competent.

"THE COURT: Overruled.

"MR. CHAVELLE: Exception. May my objection go to all the testimony of the witness.

"THE COURT: Proceed.

"MR. CHAVELLE—so that I will not have to reiterate it.

"The witness stated that he had no personal conversation with King, but that he overheard a conversation in which the defendant said that he got the sacks over in West Seattle.

"Q. Did he state from whom?

"MR. CHAVELLE: I object to that, because of the fact that the evidence was secured by an illegal search warrant.

"THE COURT: It is all under the same objection. Proceed.

"The witness stated that the defendant said he took a couple of men over to West Seattle, and they hired him to haul the sacks back; that there were three sacks between the seats in the back of the car; that he was not present when the other two sacks were found; that the sacks were opened by Mr. Hamer, a Federal Agent." (Tr. pp. 44-46).

A. B. Hamer, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

"MR. CHAVELLE: Note my objection on the same ground, to the testimony of this witness.

"Q. (By the Court): Relate the circumstances of the arrest, and what you know about it; how you happened to be there.

"A. One of the officers in Tacoma called me up a couple of days previously—

"MR. CHAVELLE: I object to what the officer in Tacoma did in regard to calling him up.

"THE COURT: Overruled.

"MR. CHAVELLE—Without the presence of the defendant. Exception.

"A. —told me that King was over there with an automobile.

"Q. (By the Court): Not what King was doing, over there in Tacoma.

"A. I thought you wanted to know how we knew he was down there.

"Q. Not what anybody told you about King, in the absence of King.

"A. I don't know how to explain it. I knew the boys over there were watching him.

"MR. CHAVELLE: I object to that, and ask to have it stricken, and the jury instructed to disregard it.

"Q. Proceed. What you know yourself about the defendant.

"A. A Blue Funnel boat came over here that morning, and we watched for him that night.

"MR. CHAVELLE: I object to that as irrelevant and immaterial.

"THE COURT: The objection is overruled.

"Q. Were you present when any opium was found in the car?

"A. Yes, we found two bags under the hood.

"Q. (By the Court): In view of my ruling, I will ask you this: What else, if anything, did you know with relation to the defendant that led you to arrest him?

"MR. CHAVELLE: I object to that, your Honor, as incompetent, irrelevant and immaterial.

"THE COURT: Let that be noted.

"MR. CHAVELLE: Exception.

"A. I had known he was in this business for a long time.

"MR. CHAVELLE: I object to that. That is a conclusion of the witness.

"THE COURT: That may be stricken.

"MR. CHAVELLE: I ask that the jury be instructed to disregard it.

"Q. Mr. Hamer, did you have any reason to believe that the defendant in this case was going to receive a shipment of opium from any source, on the night in question?

"MR. CHAVELLE: I object to that.

"THE COURT: He may state whether the defendant was under suspicion, whether he had reason to believe a felony was being committed.

"MR. CHAVELLE: Exception.

"A. I did.

———

"MR. HOAR: At this time we offer the Government's Exhibit No. 2 in evidence. I think we neglected to before.

"MR. CHAVELLE: I object upon the ground and for the reason that the same was secured by an unlawful search and seizure.

"THE COURT: Admitted.

"MR. CHAVELLE: Exception.

"(Can of opium received in evidence, and marked Government's Exhibit No. 2)." (Tr. pp. 48-53).

Assignment No. 3. That the Court erred in its refusal to instruct the jury as requested by the defendant, as follows:

I.

The Court directs you to find a verdict for the defendant, upon the ground of the insufficiency of the evidence, the search and seizure having been illegal and unlawful, in that while the defendant was proceeding in a peaceful manner upon a highway in the city of Seattle, county of King, State of Washington, within the jurisdiction of this Honorable Court, he was halted by a federal agent, and his car searched by said federal agent, and the defendant placed under arrest by said federal agent, all without any search-warrant whatsoever, and the evidence obtained was so obtained by said unlawful search and seizure.

II.

The Court instructs you to find a verdict for

the defendant, upon the ground of the insufficiency of the evidence, the search and seizure having been illegal and unlawful, in that while the defendant was proceeding in a peaceful manner upon the highway in the city of Seattle, county of King, State of Washington, within the jurisdiction of this Honorable Court, he was halted by a federal agent, and his car searched by said federal agent, and the defendant placed under arrest by said federal agent, all without any search-warrant whatsoever, and the evidence obtained was so obtained by said unlawful search and seizure.

III.

You are directed that the evidence in this case has shown that the defendant is the operator of a for hire automobile, and if the defendant has satisfied the jury that he has no knowledge of, and used due diligence to prevent the presence of the opium in said automobile, then it is your duty to acquit him.

Assignment No. 4. The Court erred in overruling the motion of the defendant for a direct verdict of acquittal, made at the close of the entire case, and before it was submitted to the jury, which motion was based upon the ground that there was not evidence offered except that secured by an illegal search and seizure.

Assignment No. 5. The Court erred in denying the motion of said defendant for a new trial, which motion was made in due time after the jury

had returned a verdict of guilty as charged in Counts I and II of the indictment, upon the following grounds:

1. Error in law committed by the trial Court in refusing to grant the motion of the defendant to suppress the evidence.

2. That said verdict was against and contrary to law.

3. That said verdict was against and contrary to the evidence.

4. Insufficiency of the evidence to justify the verdict.

5. Errors of law occurring during the trial, and excepted to by the said defendant.

6. Refusal of the Court to grant motion of the defendant to dismiss counts I and II of said indictment on the ground of the insufficiency of the evidence to sustain either count.

7. Error of the trial Court in refusing to direct a verdict for said defendant of not guilty.

8. Refusal of the Court to instruct the jury as requested by the instructions of the defendant.

Assignment No. 6. The Court erred in denying the motion of the defendant, in arrest of judgment, which motion was made in due time after the jury had returned a verdict of guilty as charged on counts I and II of the indictment, upon the following grounds:

1. That the evidence introduced at the trial

was insufficient to sustain the verdict rendered herein.

2. That the motion to suppress the evidence by reason of the illegal and unlawful search and seizure, was erroneously denied.

3. Variance between the indictment and proof introduced at the time of trial.

ARGUMENT

The error assigned which is directly raised by each of the errors claimed herein is that the conviction was based upon evidence secured by an unlawful and illegal search and seizure. Upon the hearing upon the amended petition to suppress the evidence, the federal officer admitted that he proceeded, without a search warrant or any warrant in law, to halt and immediately place under arrest the plaintiff in error on the morning in question, and that a certain quantity of smoking opium was found by Hamer and one Majewski, a police officer, in his automobile. Majewski said that he had not met the plaintiff in error before the date of the arrest and that when the plaintiff in error's car was stopped he did not know what was in it; that at the time the plaintiff in error was proceeding in a peaceful and orderly manner along the highway; that he had been looking for prowlers and that the curtains of the plaintiff in error's car were up. The plaintiff in error stated that the curtains of the car had been up all the time, as it was bad weather.

There is no question in this case but what the plaintiff in error was proceeding along the highway in an orderly manner and that the officers had no reason or excuse to halt or stop him and initiate a search which disclosed the evidence upon which both counts of the indictment are based. The guaranties of the Federal and State constitutions against unlawful search and the compelling of an accused person to give evidence against himself are expressed in the fourth and fifth amendments to the Federal constitution; and in Sections 7 and 9, Article I, of our State constitution, as follows:

> "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."
>
> "No person shall be compelled in any criminal case to give evidence against himself, * *"

Thus showing that these guaranties of both the Federal and State constitutions are in substance the same and making the law on the subject, as expounded by the Supreme Court of the United States, presently to be noticed, conclusive upon an illegal and unlawful search and seizure which involves the question of the introduction against the plaintiff in error of evidence unlawfully obtained in violation of his constitutional rights, as was the evidence here in question.

Amos v. U. S., 255 U. S. 313.

Boyd v. U. S., 116 U. S. 616; 29 L. Ed. 746; 6 Sup. Ct. 524.

Weeks v. U. S., 232 U. S. 383; 59 L. Ed. 652; L. R. A. 1915 B 834; 34 Sup. Ct. 341; Ann. Cas. 1915 C 1177.

Silverthorne Lumber Co. v. U. S., 251 U. S. 385; 64 L. Ed. 319; 40 Sup. Ct. 182.

Gouled v. U. S., 255 U. S. 298; 41 Sup. Ct. 261.

Lambert v. U. S., 282 Fed. 413-414-417.

U. S. v. Kaplan, 286 Fed. 963-973.

Giles v. U. S., 284 Fed. 208.

U. S. v. Myers, 287 Fed. 260.

U. S. v. Case, 286 Fed. 627.

U. S. v. Innelli, 286 Fed. 731.

Ganci v. U. S., 287 Fed. 60.

U. S. v. Falloco, 277 Fed. 75.

Woods v. U. S., 279 Fed 706.

Honeycutt v. U. S., 277 Fed. 939.

Snyder v. U. S., 285 Fed. 1.

Pressly v. U. S., 289 Fed. 477

Murby v. U. S., 293 Fed. 849.

U. S. v. Slusser, 270 Fed. 819.

U. S. v. Musgrave, 293 Fed. 203.

Manifestly, the Constitutional guaranties that the rights of the people to be secured in their persons, houses, papers and effects against unreasonable searches and seizures, as expressed in the fourth and fifth amendments to the Federal Constitution, and that no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons

or things to be seized, guarantees the right of a person to be undisturbed in his private affairs or his home invaded without authority of law, and protects the person in the possession of his automobile and all that is in it while upon public streets, against arrest and search without authority of a warrant of arrest or a search warrant, as fully as he would have been so protected had he and his possessions been actually inside of his own dwelling. And so fully has the protection of this guaranty been extended by the courts since time immemorial; since John Wilkes in England more than one hundred and fifty years ago fought his great battle, and our forefathers cast the tea into the seas in a protest over the infringement of what they knew to be their rights. And it is but to repeat the history of the long struggle for the security of personal rights in the English-speaking world which induced the adoption of these guaranties in the Federal Constitution of our Union and into most, if not all, of the State constitutions of the same, and it has been clearly annunciated by our great Court as still the law of the land.

It is admitted by the prosecution that they had no search warrant, and without the evidence that was secured by the unlawful search and seizure there was no case against the plaintiff in error. There is nothing to justify the search and seizure except that the officers, prowling about, had stopped several cars that evening, in the operation of a

prowler car, an occupation incident to the duties of the Police Department, and that the plaintiff in error was proceeding in an orderly and peaceful manner along the highway; that they had halted the plaintiff in error and immediately placed him under arrest and *immediately* proceeded to search his automobile, opening up some sacks which were securely wrapped.

The officer Majewski testified that he had not met the plaintiff in error before the day in question; that when the plaintiff in error's car was stopped he did not know what was in it. Participating in the arrest and in the search was a federal officer, who took possession of the contraband, thus compelling the plaintiff in error to produce evidence against himself.

Permitting a demand to be made upon the defendant in a criminal case, in the presence of a jury, to produce a paper or document containing incriminating evidence against him, is a violation of the immunity secured to him by the fifth amendment of the Constitution of the United States, providing that no person in any criminal case shall be compelled to be a witness against himself.

McKnight v. U. S., 115 Fed. 972.

If the prosecution has no right to make a demand upon a defendant in the presence of a jury to produce incriminating evidence against himself, how then can it be said that evidence procured in an un-

lawful manner through the violation of the accused's constitutional guaranty against unlawful search and seizure, may be used against him, as was done in this case? If the officers knew that a felony was being committed, they could have secured a search warrant, if they had facts sufficient upon which to have made a proper application affidavit, not a mere conjecture or suspicion, but facts which would authorize the issuing of a search warrant by the United States Government—mere suspicion would not be sufficient, nor would a conclusion of the applicant that a felony was being committed. There must be probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. If an officer can, as under the circumstances in this case, where a man is driving his car in an orderly and peaceful manner along a public highway, stop him at the end of a sawed-off shot-gun, placing him under arrest and compelling him to submit to search, ripping open packages that are found in his car to ascertain their contents and then using them against him as evidence to convict him, then the liberty of each individual is in the hands of every petty officer.

In *State v. Gibbons,* 118 Wash. 171, 189, the State of Washington, construing the Eighteenth Amendment anl reviewing the Federal cases as applicable to the subject of searches and seizures, where possession of contraband was not actually disclosed until examination of the defendant's vehicle, found that the trial court erred in admitting in evi-

dence the contraband so unlawfully taken from its possessor. In the case in question the sheriff had a suspicion that the man had intoxicating liquor in his car and telephoned one of his deputies to secure a search warrant; then, placing the defendant under arrest, proceeded to take him to the court house, where the warrant was secured and a search made, disclosing the contraband. The sheriff claimed that at the time he opened the suit case in the car he had in his possession a search warrant and therefore his act must be considered lawful, but, as the Supreme Court of the State of Washington said.

> "the fallacy of such a view lies in the fact that the sheriff had, before any search warrant was issued, completely seized and taken into his possession the appellant and the automobile and all that was in it, including the whiskey, although he did not actually see the whiskey until after he arrived at the court house. This was plainly an illegal seizure of the whiskey in so far as want of a search warrant was concerned, and the possession of the sheriff could not be rendered legal by the coming into his hands of a search warrant which was issued after such an unlawful seizure."

A learned and somewhat extended view of the question may be found in *People v. Marxhausen,* 204 Mich. 509, 171 N. W. 557, where the law announced is in full harmony with the Federal Supreme Court and a most learned and extensive opinion of the law of search warrants has been set forth in *U. S. v. Kaplan,* 286 Fed. 963, supra.

Upon the petition to suppress the evidence in

this case and the affidavit supporting it, there was nothing the court could legally have done except suppress the evidence, but the Court attempted to justify the introduction of the evidence by suggesting to the witness, Hamer, a federal agent, over the objection of counsel, to which an exception was duly noted, that the plaintiff in error was perhaps under suspicion by the said officer or that he had reason to believe a felony was being committed, although the two other officers stated that they were out looking for prowlers, not the plaintiff in error, and did not know the plaintiff in error until after he was arrested and did not know what was in the car until it was stopped and searched. And it was upon the officer, after the words were put into his mouth, answering "I did" to this suggestion of the Court, that the offer of the Government that the evidence secured by said search and seizure be admitted, was so admitted, over the objection of counsel, to which an exception was noted, and the subsequent motion to dismiss Counts I and II of the indictment, for the reason and upon the ground that all of the material evidence was secured by an unlawful search and seizure of the plaintiff in error's automobile and contents without a search warrant, was denied, and exception allowed.

Even though the plaintiff in error explained that he was a for hire driver and the officers stated that they knew the contraband was not his, the Court refused to instruct the jury, as requested by counsel, as follows:

> "You are directed that the evidence in this case has shown that the defendant is the operator of a for hire automobile, and if the defendant has satisfied the jury that he had no knowledge of and used diligence to prevent the presense of the opium in said automobile, then it is your duty to acquit him."

All the officers testified that the plaintiff in error was the operator of a for hire automobile, as did the plaintiff in error, and if the plaintiff in error satisfied the jury that he had used due diligence to pre vent the presence of opium in his automobile and had no knowledge of its presence there, then the Court erred in refusing to so instruct them. That was the question before the jury—that is, the intent of the plaintiff in error to commit a crime, and, upon the request so to do, the Court would have fairly submitted the issue to them. At the end of the Government's case the plaintiff in error moved for a direct verdict, which was denied and exception allowed, for the reason and upon the ground that there was no evidence except that secured by an illegal search and seizure, the Court then indicating that there was testimony that the search was made by police officers of the City. Mr. Hamer, the Federal Agent, in his testimony, said he participated in the search. Upon cross-examination of the witness by counsel for plaintiff in error he testified:

> "Q. You participated in this arrest?
>
> "A. Yes, sir, I did.
>
> "Q. You participated in the search?

"A. Yes, sir."

Then, referring to an affidavit filed in opposition to the motion to suppress:

"Q. Mr. Hamer, an affidavit was filed in this case that the defendant was halted by you. Did you not swear to that?

"A. He was halted by us—Majewski.

"Q. Your affidavit under date of the 14th of June, to refresh your recollection, says: 'The defendant was halted by affiant'—that is yourself—'and said Majewski, and immediately placed under arrest,' that is right?

"A. And said Majewski.

"Q. And said Majewski?

"A. And said Majewski, yes."

It was Hamer, the Federal agent, who opened the sacks and found out what was in them. It was Hamer who immeliately took possesion of them and held them until the day of the trial. There does not appear, therefore, to be any ground to suppose that the Court can make an illegal and unlawful search lawful merely because there happened to be a policeman along. *Segman v. U. S.,* 296 Fed. 474.

All of the testimony in the case was irrelevant and immaterial as to the facts learned and information obtained while conducting an unlawful search. *U. S. v. Singleton,* 290 U. S. 130, where the court said that a federal agent cannot be aided by a state search warrant not in accord with the Federal law. So the fact that a Federal agent takes two policemen along would not appear to justify an other-

wise illegal and unlawful search. *U. S. v. Case,* 286 Fed. 627, where the Court held that evidence obtained by a State officer by an unlawful search was incompetent in a Feleral court if a Federal officer co-operated with the State officer in the unlawful search. *U. S. v. Falloco,* 277 Fed. 75, supra.

It was plainly the duty of the trial court to have granted the amended motion of the plaintiff in error to suppress the evidence, and, having failed in that, to have granted the numerous motions interposed by the plaintiff in error during the trial of the case and the motion in arrest of judgment and for a new trial. His failure so to do was erroneous for the reasons hereinbefore given.

We respectfully submit that the judgment in this case should be reversed.

Respectfully submitted,

EDWARD H. CHAVELLE,

Attorney for Plaintiff-in-Error.
Richard E. King.